

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 883 of 1997

in

SPECIAL CIVIL APPLICATION NO 2566 of 1996

with

LETTERS PATENT APPEAL No 1060 of 1997

For Approval and Signature:

Hon'ble MR. JUSTICE C.K.THAKKER and

MISS JUSTICE R.M. DOSHIT

1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

BANAS CO OPERATIVE HOUSING SOCIETY LTD

Versus

ZEBUNNISHA G. NIZAMI

Appearance:

1. LETTERS PATENT APPEAL No. 883 of 1997

MR MB GANDHI for Petitioner

MS KJ BRAHMBHATT for Respondent No. 1

2. LETTERS PATENT APPEAL No 1060 of 1997

MR. PB MAJMUDAR for Petitioner

MS ROOPAL R PATEL for Respondent No. 1

SERVED BY DS for Respondent No. 2

CORAM : MR.JUSTICE C.K.THAKKER and

MISS JUSTICE R.M.DOSHIT

Date of decision: 21/10/97

ORAL JUDGEMENT (PER ; C.K.THAKKER,J)

Both these appeals arise out of a common order passed by the Ld. Single Judge in Spl. Civil Application Nos. 2566 and 2382 both of 1996 on July 31, 1997.

Without expressing final opinion as to whether Letters Patent Appeals are maintainable against an order passed by the Ld. Single Judge, we dispose of both the matters on merits.

After appreciating facts and circumstances of the case, the Co.Op. Tribunal passed an order on March 7, 1996 by which the appeal filed by the plaintiff of Lavad Suit No.955 of 1985 was allowed and relief was granted in her favour and appeal filed by Banas Co.Op. Housing Society being Appeal No. 241 of 1994 was dismissed.

According to the plaintiff, her husband was a member of Banas Co.Op.Housing Society at Ahmedabad. In place of her husband, she was admitted as a member of the society. It was the case of the society that the plaintiff was never admitted as a member and that a concession was made in her favour that she could be admitted as a member of the society provided she pays the entire amount due and payable by her husband to the society within stipulated period. Since the amount was not paid, an action was taken by the defendant society cancelling the allotment in favour of husband of the plaintiff and granting Flat No. B/5 to one Fakruddin Godharawala (appellant of LPA No. 1080 of 1997) on 1st September 1984,which could not be said to be illegal or contrary to law. The Board of Nominees, vide judgment and order dated June 9, 1994, dismissed the suit filed by the plaintiff holding that the plaintiff was never admitted as a member of the society and that there was default on her part in making payment. Since the amount was not paid, by a resolution dated 1st September 1984, the society cancelled allotment of the plaintiff and by the same resolution, allotment was made in favour of defendant no.2 which was legal, valid and in accordance with law. Since the plaintiff was never admitted as a member of the society, it was not necessary to follow the procedure laid down in Sec.36 of the Gujarat Co.Op.Societies Act,1961 as it was not a case of expulsion from membership. The Board of Nominees also recorded a finding that the allotment was made on 1st September 1984 in favour of defendant no.2, who was a bonafide purchaser for value without notice as he was not

aware of the fact that there was some dispute between the plaintiff on one hand and defendant no.1 society on the other hand. In light of the above findings, the Board of Nominees dismissed the suit filed by the plaintiff.

In appeal, however, the Tribunal appreciating the evidence on record held that the plaintiff was admitted as a member of the society. She was called upon to pay the deficit amount but no sufficient time was given to her for making the payment. The Tribunal also considered the fact that in similar cases, action of cancellation was not taken by the society against other members. It also held that when membership of the plaintiff came to be cancelled on 1st September, 1984, defendant no.2 was present in the meeting and, hence, it could not be said that he was not aware of cancellation of membership of the plaintiff. He, therefore, could not be said to be bonafide purchaser who was not aware of cancellation of the membership of the plaintiff. In light of those findings, the Tribunal set aside the order passed by the Board of Nominees and granted relief to the plaintiff.

When two petitions came up for hearing, the Ld. Single Judge observed that the petitions were under Art.227 of the Constitution of India and in exercise of supervisory jurisdiction, he did not think it fit to interfere with the order of tribunal relying upon a judgment in Mohammad Yunus v/s Mohammad, AIR 1984 SC 23.

We have heard Mr. M.B.Gandhi, Ld. Counsel for the appellant in LPA No. 883 of 1997 (Society), Mr. P.B.Majmudar, Ld. Counsel for the appellant in LPA No.1060 of 1997 and Miss VP Shah for the original plaintiff. In the facts and circumstances of the case, in our opinion, the question rests on appreciation and reappreciation of evidence. From the facts and circumstances on record, the Tribunal held that the plaintiff was admitted as a member by the society and she was called upon to pay deficit amount. The Tribunal was also of the view that the allotment was made in favour of the plaintiff and it has cancelled without giving sufficient time to make payment. Similar action was not taken against other members. If, on the basis of such evidence and finding, the Tribunal held that the action taken by the Society was not legal and valid and that before expulsion, required procedure was not followed, it cannot be said that such a finding was illegal, erroneous or without jurisdiction. So far as the jurisdiction of the Board of Nominees and Co.Op.Tribunal is concerned, it was contended by the appellants that Sec.96 of the Act had no application, but both the authorities, namely, the Board of Nominees as well as Co.Op.Tribunal have concurrently held that there was " dispute " within the meaning of Sec.96 of the Act and that Board of Nominees

and Tribunal had jurisdiction. In light of the correspondence also, we are satisfied that it could not be said that Tribunal had no jurisdiction.

On the ground of equity also, we do not find that the Tribunal or the Ld. Single Judge could not have passed the order in question. The Tribunal recorded a finding that amounts were due and payable by other members also and though no payment was made by them, action was not taken. On 1st September 1984, resolution was passed, allotment was cancelled immediately and on the very same day, allotment was made in favour of defendant no.2. If in these circumstances, relief was granted, no grievance can be made that the order passed or relief granted in favour of the plaintiff was inequitable or improper.

For all these reasons, we do not find any ground to interfere with the order passed by the Ld. Single Judge. Hence, we dismiss both the LPAs.

Mr. Majmudar states that the appellant of LPA No.1060 of 1997 has paid the entire amount of Rs. 1,35,000/ (Rs. One lakh thirty five thousand only) to the society and society must refund the said amount. Mr. MB Gandhi, Ld. Counsel stated that the Society will refund the amount to the appellant. So far as payment by plaintiff (Zebbunissa Nimazi) is concerned, Miss VP Shah stated that within a period of ten days from the receipt of notice from the society, she will pay the balance amount. Miss Shah will supply address of her client to the society as well as to Mr. M.B.Gandhi, Ld. Counsel appearing on behalf of the Society.

Mr. P.B.Majmudar, Ld. Counsel for the appellant of LPA NO. 1060 of 1997 stated that the appellant is in possession of Flat B/5 since more than ten years. He stated that appellant wants to approach a higher forum. He, therefore, prayed that status quo as on today may be ordered to be continued so as to enable the appellant to approach higher forum. Though Miss Shah objected, in the facts and circumstances of the case, status quo as on today is ordered to continue till December 31, 1997.

It is, however, ordered that the appellant of LPA No. 1060 of 1997 will not create any interest or encumbrance over the property nor part with possession thereof nor cause any damage to Flat B/5.

Both the LPAs stand dismissed accordingly.
Notice discharged. No costs.

21.10.1997 [C.K.THAKKER, J]

[MISS R.M.DOSHIT,J]

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